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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. ROBERT F. ERBE, Defendant and Appellant.	D052814 (Super. Ct. No. SCD209610)

APPEAL from a judgment of the Superior Court of San Diego County, Margie E. Woods, Judge. Affirmed.

A jury convicted Robert F. Erbe of assault by means of force likely to cause great bodily injury. (Pen. Code, § 245, subd. (a).)[1] After finding that Erbe had served six prior prison terms, the trial court sentenced him to six years in prison: the three-year middle term for the offense plus three years for the prison priors.

1 All statutory references are to the Penal Code unless otherwise indicated.

Erbe appeals, contending that his conviction must be reversed on two separate grounds. First, Erbe contends that the trial court erred by permitting the prosecutor to amend the information on the eve of trial to include the charge of assault by means of force likely to cause great bodily injury. Second, Erbe contends that the jury's verdict is not supported by substantial evidence. As discussed below, we find these contentions to be without merit and affirm.

FACTS

On October 11, 2007, Martin Fitch rode his bicycle to a methadone clinic near El Cajon Boulevard. As Fitch neared the clinic, Erbe approached, began yelling at him and pulled him off his bike by his backpack. Erbe began punching Fitch in the head, knocking him to the concrete. Erbe then kicked Fitch repeatedly in the head while Fitch lay prone on the ground. A witness called police and Fitch was taken to a hospital. A short time later, police arrested Erbe. Erbe had blood on his hands and was holding Fitch's bicycle.

DISCUSSION

Erbe raises two contentions on appeal. We address each separately below.

I.

The Trial Court Did Not Abuse Its Discretion by Permitting Amendment of the Information

Erbe argues that his conviction must be reversed because the charge of assault by means of force likely to cause great bodily injury (§ 245, subd. (a)(1)) was improperly

added on the eve of trial. Before addressing this contention, we first set forth the relevant procedural history.

A. *Procedural History*

Erbe was initially charged with three criminal offenses: robbery with the personal infliction of great bodily injury (§§ 211, 12022.7, subd. (a) (count 1); battery with serious bodily injury (§ 243, subd. (d)) (count 2); and being under the influence of a controlled substance (Health & Saf. Code, § 11550, subd. (a)) (count 3). A preliminary hearing was held at which the prosecution presented three witnesses to support the charges: a civilian witness, Robert Zouse; and two police officers who responded to the scene.

At the conclusion of the preliminary hearing, the judge found probable cause to believe Erbe committed each of the charged offenses. Specifically, the judge found probable cause to believe Erbe: (i) committed a robbery of Fitch in which he "personally inflicted great bodily injury . . . for purposes of Penal Code section 12022.7(a)";[2] (ii) committed a "battery with a serious bodily injury"; and (iii) was "under the influence of a controlled substance." The judge also found "for purposes of Penal Code section 1192.7(c)(a)[3] that there was great bodily injury inflicted as a result of the offense."

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2 Section 12022.7, subdivision (a) states: "Any person who personally inflicts great bodily injury on any person other than an accomplice in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for three years." Subdivision (f) of section 12022.7 states: "As used in this section, 'great bodily injury' means a significant or substantial physical injury."

3 The court reporter likely mistook the judge's reference to section 1192.7, subdivision (c)*(8)* to be a reference to section 1192.7, subdivision (c)*(a)*.

Shortly before trial, the prosecutor sought to add a fourth count to the information by amendment. Count 4 charged that Erbe committed an assault upon Fitch "by means of force likely to produce great bodily injury, in violation of Penal Code section 245(a)(1)."[4]

The defense objected to the amendment, contending that the charge was not supported by the testimony at the preliminary hearing. At the trial court's request, both parties filed short memoranda in support of their positions. After reviewing the parties' memoranda, the court ruled that "an amended information under the circumstances of this case is appropriate and, therefore, the court will allow the amended information to be filed" and trial to proceed. The court explained, "There is no new information, no new evidence[,]" and "the assault is a lesser included offense under the robbery and the court would have to instruct on that anyway at some point in time during the jury instructions."[5]

Trial proceeded on all four counts. At the close of the prosecution case, the prosecutor dismissed "for insufficiency of the evidence" counts 2 (battery with serious

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Subdivision (c)(8) defines a "'serious felony'" as "any felony in which the defendant personally inflicts great bodily injury on any person, other than an accomplice . . . ." There is no subdivision (c)*(a)* of section 1192.7. (§ 1192.7, subd. (c)(8).)

4 Section 245, subdivision (a)(1) defines a felony offense for "[a]ny person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury . . . ."

5 The Attorney General does not maintain, as the trial court indicated, that the assault is a lesser included offense of the charged robbery, and the resolution of that question is not necessary for this appeal.

bodily injury) and 3 (being under the influence of a controlled substance) as well as the great bodily injury allegation on count 1. The jury found Erbe not guilty of count 1 (robbery) and convicted him solely on count 4 (§ 245, subd. (a)(1)).

B. *Analysis*

Under the California Constitution, a criminal defendant prosecuted by information is entitled to a preliminary examination upon the charged crime, and a determination by a judge as to whether the crime charged "'has been committed, and whether there is sufficient cause to believe him guilty thereof.'" (*People v. Burnett* (1999) 71 Cal.App.4th 151, 165 (*Burnett*), quoting *People v. Bomar* (1925) 73 Cal.App. 372, 378; see Cal. Const., art. I, § 14.) This proceeding is "'essential to confer jurisdiction upon the court before whom [the defendant] is placed on trial.'" (*Burnett*, at p. 165.)

By statute, once a judge finds that criminal charges are warranted, an information may be filed in superior court charging the defendant "with either the offense or offenses named in the [magistrate's] order of commitment *or any offense or offenses shown by the evidence taken before the magistrate to have been committed*." (§ 739, italics added.) In addition, a trial court may permit an information to be amended at "any stage of the proceedings" so long as the information is not amended "to charge an offense not shown by the evidence taken at the preliminary examination." (§ 1009.)

Combining the statutory and constitutional requirements, our Supreme Court has announced the following legal rule: "[A]n information which charges the commission of an offense not named in the commitment order will not be upheld unless (1) the evidence before the magistrate shows that such offense was committed [citation], and (2) that the

offense 'arose out of the transaction which was the basis for the commitment' on a related offense." (*Jones v. Superior Court* (1971) 4 Cal.3d 660, 664-665; see also *Burnett, supra*, 71 Cal.App.4th at p. 165 [quoting same]; *People v. Terry* (2005) 127 Cal.App.4th 750, 766 [quoting same]; *People v. George* (1980) 109 Cal.App.3d 814, 818 (*George*) ["it is well settled that Penal Code section 1009 authorizes amendment of an information at any state of the proceedings provided the amendment does not change the offense charged in the original information to one not shown by the evidence taken at the preliminary examination"].)

The trial court's determination to permit an amendment of an information is reviewed for abuse of discretion. "[I]ts ruling will not be disturbed on appeal in the absence of showing a clear abuse of discretion." (*George*, *supra*, 109 Cal.App.3d at p. 819; *People v. Jones* (1985) 164 Cal.App.3d 1173, 1179 [same]; *People v. Bolden* (1996) 44 Cal.App.4th 707, 716 [same].)

Focusing on the first element of the test set forth in *Jones v. Superior Court*, *supra*, 4 Cal.3d 660,[6] Erbe contends that the trial court abused its discretion in permitting the amendment to the information because the evidence presented at the preliminary hearing did not support a charge of assault "by any means of force likely to produce great bodily injury." (§ 245, subd. (a)(1).) He contends that the evidence showed only that "limited force was used by [Erbe] consistent with a teenage fight." Erbe specifically

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6 Erbe does not dispute that the second element of the two-part *Jones* test is satisfied — that both the assault count and the original counts "'arose out of the [same] transaction.'" (*Jones v. Superior Court*, *supra*, 4 Cal.3d at p. 665.)

highlights the testimony that the kicks "were partially absorbed by a backpack" and the punches were, in Erbe's words, mere "[j]abs" not "knock-out punches." We disagree.

The evidence presented at the preliminary hearing was sufficient to support a finding that Erbe's assault was by a means likely to cause "significant or substantial bodily injury or damage" (i.e., great bodily injury) as opposed to "trivial or insignificant injury or marginal harm." (See *People v. Duke* (1985) 174 Cal.App.3d 296, 302 (*Duke*) ["The term 'great bodily injury' as used in the felony assault statute means significant or substantial bodily injury or damage; it does not refer to trivial or insignificant injury or marginal harm"].)

According to the testimony at the preliminary hearing, while Fitch assumed a completely passive posture, Erbe threw seven to 10 punches at Fitch's head, knocked him to the ground and proceeded to kick him in the back of the head with his boots. While some of the blows may have been "absorbed" by Fitch's backpack (as Erbe emphasizes), Zouse also testified that Erbe connected with "two or three kicks to the back of [Fitch's] head" while Fitch was prone on the ground. Zouse also observed bruising and cuts on Fitch's face after the assault.

Officer Jeffrey Livermore, testifying at the preliminary hearing, noted lacerations on Fitch's nose and ear, and blood on the back of his skull. He also testified that after the beating, Fitch received care from technicians at the methadone clinic and was transported to the hospital. In describing the assault, Fitch told Livermore that he had been "batter[ed]" and his "head hit the ground," "rattl[ing] my brain."

Given the totality of this evidence, an assault by means of force likely to produce great bodily injury was "shown by the evidence taken at the preliminary examination." (§ 1009; *Jones v. Superior Court, supra*, 4 Cal.3d at pp. 664-665; see also *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028 (*Aguilar*) ["That the use of hands or fists alone may support a conviction of assault 'by means of force likely to produce great bodily injury' is well established"]; *Duke*, *supra*, 174 Cal.App.3d at pp. 302-303 [recognizing that "'if hands, fists or feet, etc., are the means employed'" to cause physical injury, "'the charge will normally be assault with force likely to produce great bodily injury'"]; cf. *People v. Encerti* (1982) 130 Cal.App.3d 791, 800 [explaining standard for charge to go forward after preliminary hearing is "such a state of facts as would lead a person of ordinary caution or prudence to believe and consciously entertain a strong suspicion of the guilt of the accused"].) Consequently, the trial court acted within its discretion in permitting the amendment to the information.[7]

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7 Although Erbe does not appear to specifically argue this point, we note as well that the amendment to the information did not violate Erbe's constitutional rights, including the right to fair notice of the charges against him. The charge added by the information paralleled the existing charges (particularly the battery charge) and arose from the same facts that had been described in the preliminary hearing testimony. (See *People v. Thomas* (1987) 43 Cal.3d 818, 829 ["'Notice of the particular circumstances of the offense is given not by detailed pleading but by the transcript of the evidence before the committing magistrate'"].) In opposing the motion to amend the information, the defense did not request a continuance to respond to the amendment. (See *People v. Winters* (1990) 221 Cal.App.3d 997, 1005 ["If the substantial rights of the defendant would be prejudiced by the amendment, a reasonable postponement not longer than the ends of justice require may be granted"].)

II.

Sufficient Evidence Supports the Jury's Verdict

Erbe also contends that the evidence presented at trial was insufficient to allow a jury to convict him of assault by "means of force likely to produce great bodily injury." (§ 245, subd. (a)(1).) We disagree.

In evaluating a challenge to the evidence supporting a jury's verdict, "we review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence — that is, evidence that is reasonable, credible and of solid value — from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Snow* (2003) 30 Cal.4th 43, 66.) Reversal is not warranted "unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) In performing our review of the record, we are limited by the fact that it "'"is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends."'" (*People v. Smith* (2005) 37 Cal.4th 733, 739.) We are, thus, not permitted "to reweigh the evidence or redetermine issues of credibility" (*People v. Martinez* (2003) 113 Cal.App.4th 400, 412 (*Martinez*)), and even the "uncorroborated testimony of a single witness is sufficient to sustain a conviction, unless the testimony is physically impossible or inherently improbable." (*People v. Scott* (1978) 21 Cal.3d 284, 296 (*Scott*).)

"[W]hether the force used by the defendant was likely to produce great bodily injury is a question for the trier of fact to decide." (*People v. Sargent* (1999) 19 Cal.4th

1206, 1221 (*Sargent*).) "'[G]reat bodily injury'" is synonymous with "significant or substantial bodily injury or damage; it does not refer to trivial or insignificant injury or marginal harm." (*Duke*, *supra*, 174 Cal.App.3d at p. 302.) It is "well established" that "the use of hands or fists alone may support a conviction of assault 'by means of force likely to produce great bodily injury.'" (*Aguilar*, *supra*, 16 Cal.4th at p. 1028.)

Our review of the record in this case reveals sufficient evidence to support the jury's verdict. The trial testimony depicted a savage beating, consisting of numerous blows (both kicks and punches) to the head of an unresisting victim. Zouse described the assault as initially consisting of "roundhouse blows" — "constant overhand punch[es]" connecting to the side of Fitch's face and the back of his head. The punches were similar to "a boxer trying to throw a knock-out punch" and were accompanied by a "hollow sound of a punch going to a skull."

After Fitch was knocked to the pavement, Erbe began kicking him in the head. Zouse emphasized that the kicks had a lot of force: sufficient force to move Fitch's prone body. Zouse stated that it appeared that Erbe, who was wearing shoes, was "trying to injure" Fitch. Erbe delivered "hard right-footed kick[s] aimed directly at the back of the head or the side of the head."

Erbe acknowledges that Zouse's *trial* testimony described the assault as consisting of "serious knock-out punches and forceful kicks designed to injure."[8] Erbe suggests,

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8 Zouse's testimony supplied most of the details of the assault. Fitch testified that he was riding his bike to the methadone clinic when someone started yelling at him and

however, that we should discount this testimony because Zouse's preliminary hearing testimony was less "exuberant." This argument ignores the standard of review. Any discrepancy between the trial testimony and the preliminary hearing testimony presented a credibility question for the jury to determine. As explained above, on appeal of a jury verdict, we must assume that the jury credited Zouse's trial testimony. (*Scott*, *supra*, 21 Cal.3d at p. 296; *Martinez*, *supra*, 113 Cal.App.4th at p. 412.)

Erbe also emphasizes that, in his view, Fitch "suffered no serious injuries as a result of the incident." As Erbe himself notes, however, the question before the jury was not "whether serious injury was caused, but rather was the force used likely to cause it."[9] Thus, even if we accepted Erbe's characterization of Fitch's injuries as relatively minor, we would still find that the jury's verdict is supported by substantial evidence based on the manner in which they were inflicted. (See *Duke*, *supra*, 174 Cal.App.3d at p. 302 [recognizing that a § 245 offense can be committed "'without infliction of any physical injury'" because the issue "'is not whether serious injury was caused, but whether the *force used* was such as would be likely to cause it'"]; *Covino*, *supra*, 100 Cal.App.3d at p. 667 ["an injury is not an element of the crime, and the extent of any injury is not determinative"].)

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pulled him off his bike. Fitch's head hit the concrete and he could not remember anything else after that point until the arrival of police.

9 Similarly, the fact that the prosecution dismissed the allegation on count 1 and the charge in count 2, which relied on the actual *infliction* of great bodily injury, does not, as Erbe suggests, demonstrate a concession as to whether the assault was *likely* to inflict great bodily injury. (See *People v. Covino* (1980) 100 Cal.App.3d 660, 667 (*Covino*).)

In sum, there was a factual question presented to the jury as to whether the assault described by Zouse was of sufficient severity to constitute an assault by "means of force likely to produce great bodily injury." (§ 245, subd. (a)(1); *Sargent*, *supra*, 19 Cal.4th at p. 1221.) Substantial evidence in the record supports the jury's ultimate conclusion on this question and we have no authority to set it aside.

DISPOSITION

Affirmed.

IRION, J.

WE CONCUR:

HUFFMAN, Acting P. J.

O'ROURKE, J.